

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY**

WILLIAM J. MOHR,	:	
	:	C.A. No: 10C-02-040 (WLW)
Plaintiff,	:	
	:	
<u> v. </u>	:	
	:	
PROGRESSIVE NORTHERN	:	
INSURANCE COMPANY, a	:	
foreign corporation,	:	
	:	
<u> </u>	:	
Defendant.	:	

**Submitted: July 16, 2010
Decided: September 27, 2010**

*Upon Consideration of Defendant's
Motion for Summary Judgment*
DENIED

OPINION AND ORDER

Keith E. Donovan, Esq., Morris, James, LLP, Dover, Delaware for Plaintiff

Daniel P. Bennett, Esq., Mintzer, Sarowitz, Zeris, Ledva & Meyers, LLP,
Wilmington, Delaware for Defendant

Young, J.

Mohr v. Progressive Northern Insurance Company
C.A. No: 10C-02-040 (WLW)
September 27, 2010

SUMMARY

_____Defendant Progressive Northern Insurance Company (“Progressive”) moves for summary judgment against Plaintiff William J. Mohr (“Plaintiff”) on the basis that Plaintiff is not an “insured person” pursuant to the Personal Protection Coverage portion of the relevant Progressive policy. Plaintiff counters that Progressive’s definitional language is inconsistent with Delaware’s No-Fault Statute, and is contrary to public policy.

This claim for personal injury protection (“PIP”) benefits arises from a February 22, 2008 motor vehicle accident occurring in Seaford, Delaware. Because it cannot be said, at this juncture, that Progressive’s attempts to restrict Plaintiff’s PIP benefits are authorized by Delaware’s No-Fault law, Progressive’s Motion for Summary Judgment is **DENIED**.

FACTS

_____On February 22, 2008, Plaintiff suffered personal injuries after he was struck, as a pedestrian, in Seaford, Delaware. Shelly Brittingham (“Ms. Brittingham”) owned the motor vehicle responsible for striking Plaintiff. Ms. Brittingham’s motor vehicle was registered and insured in Delaware. Pursuant to 21 *Del. C.* § 2118, Plaintiff received the \$15,000 maximum PIP benefits provided for by the insurer of Ms. Brittingham’s motor vehicle.

At the time of the incident, Plaintiff lived with his mother, Maridebbie Mohr (“Plaintiff’s mother”). Plaintiff’s mother had a Delaware automobile insured through Progressive at the time of the collision. This Progressive policy provides PIP benefits in the amount of \$100,000. Plaintiff requested additional PIP coverage through the

Mohr v. Progressive Northern Insurance Company
C.A. No: 10C-02-040 (WLW)
September 27, 2010

Progressive policy, but Progressive denied coverage.

Pursuant to Progressive’s Part II Personal Protection Coverage (the “Coverage”), Progressive pays reasonable and necessary covered expenses “incurred as a result of *bodily injury* sustained by an *insured person* in an *accident*”¹

According to the terms of the Progressive policy, an “insured person” means:

you or a *relative*, or any other household resident who is economically dependent on the named insured, when injured ... as a pedestrian in an *accident* with any land motor vehicle other than a motor vehicle insured under Delaware law[.]²

Progressive contends that Plaintiff is not an “insured person” pursuant to the Coverage offered by the Progressive policy, because the striking vehicle, Ms. Brittingham’s vehicle, was not a covered vehicle under the policy. Furthermore, Progressive advances that, because Ms. Brittingham’s was a separately insured, Delaware-registered motor vehicle, Plaintiff has already received the available PIP benefits.

Plaintiff submits that the Progressive policy impermissibly attempts to limit PIP benefits to an insured when that insured is injured as a pedestrian. Specifically, Plaintiff takes issues with the fact that the Progressive policy language provides coverage to Plaintiff had he been struck as a pedestrian by a non-Delaware vehicle, but denies coverage to Plaintiff when he was struck by a Delaware vehicle. Plaintiff

¹ Pl.’s Ex. D at 12 (emphasis in original).

² Pl.’s Ex. D at 13 (emphasis in original).

Mohr v. Progressive Northern Insurance Company
C.A. No: 10C-02-040 (WLW)
September 27, 2010

argues that such a limitation on PIP coverage is inconsistent with Delaware's No-Fault statute, and is against public policy.

STANDARD OF REVIEW

When considering a motion for summary judgment, the Court must determine if there are genuine issues of material fact.³ If there are none, and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate.⁴ If, when considering the facts in a light most favorable to Plaintiff, the Court determines that no reasonable trier of fact would find in favor of Defendant, summary judgment is appropriate.⁵

DISCUSSION

The parties rely heavily on four decisions issued from three Delaware courts: the Superior Court decision of *Boling v. All State Insurance Company*⁶; the Superior Court decision of *Jones v. State Farm Mutual Insurance Company*⁷; and the Supreme Court decision of *Gonzalez v. State Farm Mutual Automobile Insurance Company*.⁸ After careful review of the case law and upon consideration of the parties' arguments, the Court finds that the case *sub judice* does not warrant the granting of summary

³ Super. Ct. Civ. R. 56(c).

⁴ *Id.*

⁵ *Matas v. Green*, 171 A.2d 916, 918 (Del. Super. Ct. June 7, 1961).

⁶ 2006 WL 3240008 (Del. Super. Oct. 30, 2006).

⁷ 1998 WL 473041 (Del. Super. June 8, 1998).

⁸ 1996 WL 526014 (Del. Supr. Aug. 19, 1996).

Mohr v. Progressive Northern Insurance Company
C.A. No: 10C-02-040 (WLW)
September 27, 2010

judgment in favor of Progressive. Plaintiff may be entitled to receive the \$85,000 difference between his mother's policy with Defendant and the lesser-insured policy of Ms. Brittingham's motor vehicle.

"In *Gonzales*, the Delaware Supreme Court did not allow double recovery of PIP benefits."⁹ "The minor child in *Gonzales* collected \$15,000 in PIP benefits from the insurer of the vehicle that hit him while riding a bicycle."¹⁰ "However, the child's mother sought to collect an additional \$15,000 from her own insurance carrier, defendant State Farm."¹¹ "The mother's insurance policy with State Farm covered up to \$15,000 in PIP benefits[,] and specifically contained a double recovery exclusion."¹² "As the *Gonzales* [c]ourt found that the tort-feasor's vehicle had the 'required insurance' of \$15,000, it granted summary judgment in favor of defendant State Farm."¹³ "Hence, the Court denied double recovery [in *Gonzales*] because plaintiff had already recovered the full \$15,000 that would have been afforded by her policy."¹⁴

Additionally, the Superior Court, in *Jones*, denied the recovery of additional

⁹ *Boling*, 2006 WL 3240008 at *5.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

Mohr v. Progressive Northern Insurance Company
C.A. No: 10C-02-040 (WLW)
September 27, 2010

PIP benefits.¹⁵ “The plaintiff in *Jones* sustained injuries from an accident while a passenger in the car of a vehicle owned by Percy Marshall.”¹⁶ “The insurance carrier of Mr. Marshall covered plaintiff for \$15,000 in PIP benefits.”¹⁷ “However, plaintiff sought to recover additional benefits from his mother’s policy that afforded up to \$25,000 in PIP benefits.”¹⁸ “While the *Jones* [c]ourt denied plaintiff from recovering the entire \$25,000, it did allow him to recover \$10,000 from his mother’s policy.”¹⁹ “The Court, therefore, allowed plaintiff to ‘cover the difference between [his] policy and that of an individual with lesser PIP coverage.’”²⁰ “As such, the *Jones* [c]ourt differentiated between the exclusion of additional benefits and the right to receive a difference in benefits.”²¹

The Superior Court in *Boling* followed its rationale in *Jones*. While driving a vehicle owned by Paul Whitely, the plaintiff in *Boling* sustained injuries from an accident.²² At the time of the accident, Whitely’s car was insured through

¹⁵ 1998 WL 473041 (Del. Super. June 8, 1998).

¹⁶ *Boling*, 2006 WL 3240008 at *5.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Boling*, 2006 WL 3240008 at *1.

Mohr v. Progressive Northern Insurance Company
C.A. No: 10C-02-040 (WLW)
September 27, 2010

Progressive.²³ Plaintiff received \$25,000 from Progressive for his injuries.²⁴ However, plaintiff sought to recover additional PIP benefits from his automobile insurance policy with defendant Allstate.²⁵ “Under the policy, Plaintiff contracted for \$50,000 of PIP with [defendant Allstate].”²⁶ “Therefore, [p]laintiff[sought] to collect the \$25,000 difference between the amount of PIP he contracted for through [d]efendant Allstate and the amount of PIP he received from Progressive.”²⁷ In denying defendant Allstate’s motion for summary judgment, the *Jones* court held that plaintiff was possibly entitled to “recover the difference between his policy payment with [d]efendant Allstate and the lesser policy payment afforded to him with Progressive.”²⁸

The Court is keenly aware that none of the case law cited corresponds directly with the factual scenario presented here. The case law does, however, support the Court’s finding that Plaintiff may be entitled to the monetary difference in the two policies. To hold otherwise would limit no-fault coverage beyond what the legislature envisioned when drafting Delaware’s No-Fault Statute. Neither 21 *Del. C.* § 2118(a)(2)(d) nor 21 *Del. C.* § 2118(a)(e) contains a prohibition against stacking

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Boling*, 2006 WL 3240008 at *6.

Mohr v. Progressive Northern Insurance Company
C.A. No: 10C-02-040 (WLW)
September 27, 2010

or differential offsets.

The opposite – and illogical – result would be that no-fault coverage paid for and available to an insured would be eliminated by the availability of lesser coverage from a separately insured, *Delaware* vehicle. The definitional language of Progressive’s policy attempts to prevent the insured from deriving the benefit of his bargain. That is to say, if a hypothetical plaintiff is struck by *any* vehicle on the road – other than a separately-insured, Delaware-registered vehicle – she can recover the full PIP benefits available under her own policy. However, should she have the misfortune of being struck by one of these ill-fated, lesser-insured Delaware vehicles, she must resign herself to that vehicle’s limited coverage. This crapshoot cannot be what the legislature intended for Delaware residents.

The Court’s decision is consistent with its interpretation of *Gonzales*, *Jones*, and *Boling*. All three of these cases involve situations in which the plaintiffs recovered PIP benefits from one insurance company, and subsequently attempted to receive additional PIP benefits from their own carrier. Where the plaintiffs’ own insurance coverage exceeded the amount paid by the first insurance company, plaintiffs have consistently been permitted to recover the difference. This Court finds no reason to hold differently. Therefore, Progressive’s Motion for Summary Judgment is **DENIED**.

SO ORDERED.

/s/ Robert B. Young
J.

RBV/sal
cc: Counsel
File